No. 13800

In the United States Court of Appeals

For the Ninth Circuit

ROBERT DONALD ROWLAND,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Supplemental Brief of Appellant

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Supplemental Brief of Appellant

On August 24, 1953 the Court ordered the parties to each file a Supplemental Brief, within 10 days, on

EXHAUSTION OF ADMINISTRATIVE PROCESS AS A PREREQUISITE TO PRESENTING A DEFENSE IN A SELECTIVE SERVICE CRIMINAL PROSECUTION.

The Court pointed out that the situation in *habeas corpus* was not comparable and expressed the desire that the situation in criminal prosecutions alone be dealt with.

I.

Falbo v. United States, 320 U. S. 549, was the Supreme Court's first expression on the point. In its decision the Court held that Falbo was in no position to defend because he had not reported at the induction station. "The connected series of steps into the national service which begins with registration with the local board does not end until the registrant is accepted by the army, navy, or civilian public service camp. Thus a board order to report is no more than a necessary intermediate step in a united and continuous process designed to raise an army speedily and efficiently.

"In this process the local board is charged in the first instance with the duty to make the classification of registrant which Congress in its complete discretion saw fit to authorize. Even if there were, as the petitioner argues, a constitutional requirement that judicial review must be available to test the validity of the decision of the local board, it is certain that Congress was not required to provide for judicial intervention *before final acceptance of an individual for national service.* The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order *directing a registrant to report for the last step in the selective process.*" [553-554] (Italics supplied.)

[The Presiding Judge and the United States Attorney referred to Falbo as a *habeas corpus* case. They evidently had in mind *U. S. ex rel. Falbo v. Kennedy,* (C. A. 4) 141 F. 2d 689, cert. den'd. 322 U. S. 745, wherein it was held that a judgment of conviction of violating the Selective Service Act, which was affirmed by the United States Supreme Court could not be collaterally attacked on the same grounds by resort to *habeas corpus.*]

Gibson v. United States (heard with Dodez v. United States), 67 S. Ct. 301, was the next and latest selective service criminal appeal before the high court involving the point. Gibson had failed to report for work at the Civilian Public Service Camp, as ordered. Dodez reported but walked out after 5 days. The government contended that neither could defend in that Gibson had not gone far enough and that Dodez had gone too far.

"*The principal issues relate to the time of completing the administrative selective process* and the effect in each case of what was done in this respect upon the petitioner's right to make defense in the criminal proceedings on various grounds going to the validity of the classification." [302] (Italics supplied.)

The court reviewed the essential portions of the evidence and first found that a change in the regulations relative to the time and place of the physical examination removed Dodez from the scope of the *Falbo* decision.

"Dodez refused to go to the camp. But Gibson, thinking the *Falbo* decision required him to report there in order to exhaust his administrative remedies, went to the camp, remained for five days and then departed without leave. It is undisputed that he intended at no time to submit to the camp's jurisdiction or authority and that at all times made this intent clear. *Everything he did was done solely to make sure that the administrative process had been finished* and with a view to avoiding the barrier Falbo encountered in his trial when he sought to question his classification." [302] (Italics supplied.)

It is therefore evident that by "completing the administrative process" the court has consistently meant that reporting at the induction station (or the Civilian Public Service Camp) was the final step and that taking this final step gives a defendant " . . . standing in a subsequent *criminal prosecution* to challenge the validity of the classification given by his draft board." [The quoted language, with italics supplied, is that of former Attorney General McGranery in his last reported decision as a district judge: *Ex Parte Fabiani,* 105 F. Supp. 139, 145.] Rowland, the appellant in the instant case, reported at the induction station and there refused to *submit* to induction. By this conduct he avoided the barrier Falbo encountered. *Estep v. United States,* 327 U. S. 114.

II.

Rowland was not *required* to demand a personal appearance hearing at the local board and/or an appeal from its classification decision or from the reclassification decision boards must make after the personal appearance.

The appearance before the board and the appeal are optional and are privileges; an inspection of the Regulations and the official Selective Service System forms shows this. The Notice of Classification (SSS Form No. 110), at all times involved, read as follows:

> "NOTICE OF RIGHT TO APPEAL
>
> "Appeal from classification by local board must be made within 10 days after the mailing of this notice by filing a written notice of appeal with the local board.
>
> Within the same 10-day period you may file a written request for personal appearance before the local board. If this is done, the time in which you may appeal is extended to 10 days from the date of mailing of a new Notice of Classification after such personal appearance.
>
> If an appeal has been taken and you are classified by the appeal board in either Class 1-A or Class 1-A-O and one or more members of the appeal board dissented from such classification you may file a written notice of appeal to the President with your local board within 10 days after the mailing of this notice."

The Regulations pertaining to the privilege *to appear* before the local board are presently in 32 C.F.R.

§1624.1 and are similar, in all matters that concern us, to the version in effect at the time Rowland was classified. They then read:

"§624.1 [At this time the digit 1 had not been placed before the 624.1]

624.1 *Opportunity to Appear in Person.*—(a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended, except when the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control.

(b) No person other than registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with or on behalf of a registrant: *Provided,* That if the registrant does not speak English adequately he may appear with a person to act as interpreter for him: *And provided further,* That no registrant may be represented before the local board by anyone acting as attorney or legal counsel.

(c) If the written request of the registrant to appear in person is filed after such 10-day period and the local board finds that the registrant was

unable to file such request within such period because of circumstances over which he had no control, the local board shall enter in the 'Minutes of Actions by Local Board and Appeal Board' on the Classification Questionnaire (SSS Form No. 100) the date on which the request was received and the date and the time fixed for the registrant to appear and shall promptly mail to the registrant a notice of the time and place fixed for such appearance.

(d) If such a written request of a registrant for an opportunity to appear in person is received after the 10-day period following the mailing of a Notice of Classification (SSS Form No. 110) to the registrant, the local board, unless it specifically finds that the registrant was unable to file such a request within such period because of circumstances over which he had no control, shall advise the registrant, by letter, that the time in which he is permitted to file such a request has expired, and a copy of such letter shall be placed in the registrant's file. Under such circumstances, no other record of the disposition of the registrant's request need be made.

624.2 *Appearance Before Local Board.*—(a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the 'Minutes of Actions of Local Board and Appeal Board' on the Classification Questionnaire (SSS Form No. 100).

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have

been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, shall mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 623.4 of this chapter.

(e) Each such classification shall be followed by the same right of appeal as in the case of an original classification."

The Regulations pertaining to the privilege *to appeal* are presently in 32 C.F.R. §1626.2 and are also similar, in all matters that concern us, to the version in effect at the time Rowland was classified. They then read:

> "1626.2 *Appeal by Registrant and Others.*— (a) The registrant, any person who claims to be a dependent of the registrant, any person who prior to the classification appealed from filed a written request for the current occupational deferment of the registrant, or the government appeal agent may appeal to an appeal board from any classification of a registrant by the local board except that no such person may appeal from the determination of the registrant's physical or mental condition.
>
> (b) The government appeal agent may take any appeal authorized under paragraph (a) of this section at any time within 10 days after the date when the local board mails to the registrant a Notice of Classification (SSS Form No. 110) or at any time before the registrant is mailed an Order to Report for Induction (SSS Form No. 252).
>
> (c) The registrant, any person who claims to be a dependent of the registrant, or any person who prior to the classification appealed from filed a written request for the current occupational deferment of the registrant, may take an appeal authorized under paragraph (a) of this section at any time within the following periods:
>
> (1) Within 10 days after the date the local board mails to the registrant a Notice of Classification (SSS Form No. 110).

> (2) Within 30 days after the date the local board mails to the registrant a Notice of Classification (SSS Form No. 110), if, on that date, it appears that the registrant is located in one and the local board which classified the registrant is located in another of the following: The continental United States, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, or the Virgin Islands of the United States."

Since appellant bases his claim on jurisdictional grounds, that is, on a void order, no appeal was necessary. The Selective Service administrative process is a continuous one beginning with registration and ending at the induction ceremony.

> *Falbo v. United States,* 320 U. S. 549;
> *Estep v. United States,* 327 U. S. 114.

The administrative process is like a ladder: the registrant must go to the very end; but there is no requirement that he step on every rung. For example, could it be contended that a Selective Service registrant has not exhausted the administrative process if he did not ask for a Personal Appearance Hearing? Yet the Personal Appearance Hearing is the only opportunity the board or any classifying official ever has to look the registrant in the eye and hear his views for deferment. In other words much if not all of the appellate procedure provided is undisputably optional; if the registrant doesn't choose to avail himself of all of it or if he is deprived of all of it or any part

of it because he is misled by Selective Service functionaries he should not be deprived of his day in court.

Even in civil cases this is true. In *Skinner & Eddy Corp. v. United States,* 39 S. Ct. 375, 377, the Interstate Commerce Commission had issued a rate order which the plaintiffs attacked as lacking statutory authority. It was there contended that plaintiff should have sought administrative review. The Court said:

> "But plaintiff does not contend that 75 cents is an unreasonable high rate, or that it is discriminatory, or that there was mere error in the action of the commission. The contention is that the commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the commission."

The following cases are to the same effect:

Koepke v. Fontecchio, 177 F. 2d 125, 128 (C.A. 9);
Stark v. Wickard, 321 U. S. 288, 307-311;
Ng Fung Ho v. White, 259 U. S. 276, 284;
Gegiow v. Uhl, 239 U. S. 3, 9;
American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 107-110.

III.

Generally, where a registrant does not take any or all of the administrative remedies provided by the regulations because selective service officials frustrated or ignorantly misled him, he is excused from going through the affected remedies even if they are otherwise considered prerequisites, something we do not concede in this case.

The basis for the doctrine of exhaustion is that administrative specialists are better able than the courts to handle technical matters and the courts therefore should be relieved of such burdens. *Koepke v. Fontecchio,* 177 F. 2d 125 (C.A. 9). It was never intended that this doctrine should assist careless or ignorant officials to deprive a youngster from having his day in court.

In all the usual situations concerning exhaustion of administrative process the complainting party is an experienced business man and one who has had the benefit of legal assistance, not a youngster who actually is forbidden to have counsel at the most crucial stage of selective service procedure. [See §1624.1 (b): "No registrant may be represented before the local board by anyone acting as attorney or legal counsel."]

IV.

Reproduction of the following Regulations, in the precise form in effect when applicable to appellant, may aid the court.

1606.51 *Forms Made Part of Regulations*—(a) All forms and revisions thereof referred to in these or any new or additional regulations, or in any amendment to these or such new or additional regulations, and all forms and revisions thereof prescribed by the Director of Selective Service shall be and become a part of these regulations in the same manner as if each form, each provision therein, and each revision thereof were set forth herein in full. Whenever in any form or in the instructions printed thereon, any person shall be instructed or required to perform any act in connection therewith, such person is hereby charged with the duty of promptly and completely complying with such instruction or requirement.

(b) The Director of Selective Service, as to such persons or agencies as he designates, may waive any requirement that any form be notarized or sworn to.

625.1 *Classification Not Permanent.*—(a) No classification is permanent.

(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, or dependency

status, or in his physical condition. Any other person should, within 10 days after knowledge thereof, report to the local board in writing any such fact.

(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally re-examined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants.

§1622.20 *Class IV-E: Conscientious Objector Opposed to Both Combatant and Noncombatant Training and Service.*—(a) In Class IV-E shall be placed any registrant who, by reason of religious training and belief, is found to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

(b) Section 6 (j) of title I of the Selective Service Act of 1948 provides in part as follows:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

On September 28, 1951 [Rowland was not ordered to report for induction until July 16, 1952] the follow-

ing regulations, as substitutes for the above §1622.20 (IV-E) were printed and sent to all local boards:

1622.14 *Class I-O: Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest.*—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

(b) Section 6 (j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

[§1622.15 Class I-S Student Deferred by Statute] (text omitted as not relevant)

1622.16 *Class I-W: Conscientious Objector Performing Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest.*—(a) In Class I-W shall be placed any registrant who has entered upon and is performing civilian work contributing to the maintenance of

the national health, safety, or interest, in accordance with the order of the local board.

(b) In Class I-W shall be placed any registrant who subsequent to being ordered by the local board to perform civilian work contributing to the maintenance of the national health, safety, or interest has been released from such work by the local board after satisfactorily performing the work for a period of twenty-four consecutive months or has been sooner released from such work by the Director of Selective Service under the provisions of section 1660.21 of this chapter. Each such registrant shall be identified on all records by following his classification with the abbreviation "Rel." and, upon attaining an age beyond the maximum age of liability for military service under the provisions of the selective service law, all such registrants shall be reclassified in Class V-A.

Respectfully submitted,

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